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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Chester Lee Marks,

10 Plaintiff,

11 v.

12 Walmart Supercenter #2113,

13 Defendant.
14

No. CV-24-00381-PHX-KML

ORDER

15 Plaintiff Chester Lee Marks filed this suit against Walmart alleging discrimination
16 based on his race and age. Marks alleges Walmart violated his constitutional rights and
17 federal anti-discrimination statutes. Walmart cannot be sued for violating constitutional
18 rights and Marks has not provided sufficient facts in support of his statutory claims. The
19 complaint will be dismissed with limited leave to amend.

20 **I. Background**

21 The complaint is difficult to follow but recounts events that occurred in March and
22 April 2023. Marks identifies himself as a 73-year-old African American. (Doc. 1-1 at 6.)
23 On March 28, 2023, Marks went to “The Arizona @ work One-Stop Center,” a “hiring
24 event” involving multiple private companies. (Doc. 1-1 at 4.) At that event, Marks met a
25 Walmart representative from store #4324 named Dawn. Marks asked Dawn if Walmart
26 “had any greeting job” and she informed him that Walmart store #2113 had such an
27 opening. Dawn helped Marks complete a job application for the “greeting job” but Dawn
28 told Marks she could not help him “with the assessment test.” (Doc. 1-1 at 4.) Dawn then

1 told Marks “to complete the W2 Form and when you finish report to Nelly” at store #2113.
2 (Doc. 1-1 at 4.)

3 The same day as the hiring event, Marks went to store #2113 and “let her know that
4 [he had] been hired” by Dawn. (Doc. 1-1 at 4.) Marks informed Nelly that Dawn had helped
5 him complete the application and told him to report to store #2113. (Doc. 1-1 at 4-5.) Nelly
6 advised Marks that his “job application was not submitted to this Walmart store.” (Doc. 1-
7 1 at 4.) The sequence of events then seems to break down because Marks alleges the “store
8 manager” asked if Marks could “come back tomorrow on 04/04/2023 at approx. 10:30
9 a.m.” Marks agreed to return but the complaint does not state whether he did so. Instead,
10 the complaint alleges Marks returned on April 6 to “meet another helper that work [sic]
11 with Nelly.” (Doc. 1-1 at 5.) Marks was asked to return the following day. When Marks
12 returned on April 7, he “was told that they were to business [“too busy”] to talk with [him]
13 about a job.” Finally, on a later unidentified date Marks received an email stating his job
14 application was “pending” and he needed to re-apply. (Doc. 1-1 at 5.)

15 Marks appears to allege he was hired by Dawn on March 28, 2023, and remains
16 employed by Walmart because he has “never been fired from [the] job.” (Doc. 1-1 at 5.)
17 He alleges he was not allowed to work because of his race and age. (Doc. 1-1 at 5, 6.)
18 Marks alleges Walmart violated his rights under the 8th and 14th Amendments to the
19 Constitution, Title VII, and (although not referenced in the complaint) the Age
20 Discrimination in Employment Act (“ADEA”). (Doc. 1-1 at 5-6.) Marks demands \$25
21 million in compensatory damages and \$30 million in punitive damages. (Doc. 1-1 at 6.)
22 Walmart filed a motion to dismiss arguing Marks has not stated any plausible claim for
23 relief.

24 A few weeks after Walmart filed its motion to dismiss, Marks filed a motion to
25 amend the complaint. That motion requests leave to add claims against Josh Sanchez, an
26 employee of the EEOC. (Doc. 10.) The motion to amend states Marks visited an EEOC
27 office and Sanchez somehow “indicated that he was going to prepare [Marks’s] charge
28 claim against Walmart.” (Doc. 10 at 1.) Sanchez allegedly failed to do so. Marks visited

1 Sanchez a second time and during that visit Sanchez stated “he could not prepare the charge
2 claim document for [Marks].” (Doc. 10 at 2.) The motion to amend indicates Marks wishes
3 to sue Sanchez for lying to him, but it is not clear what type of claim Marks has in mind.

4 Finally, Marks filed a motion for the appointment of counsel. Marks requests the
5 court appoint counsel based on his age, finances, poor reading and spelling abilities, and
6 several illnesses. (Doc. 15.)

7 **II. Motion to Dismiss**

8 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
9 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,
10 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)
11 (internal citations omitted)). This is not a “probability requirement,” but a requirement that
12 the factual allegations show “more than a sheer possibility that a defendant has acted
13 unlawfully.” *Id.* A claim is facially plausible “when the plaintiff pleads factual content that
14 allows the court to draw the reasonable inference that the defendant is liable for the
15 misconduct alleged.” *Id.* “[D]etermining whether a complaint states a plausible claim is
16 context specific, requiring the reviewing court to draw on its experience and common
17 sense.” *Id.* at 663–64.

18 **a. Constitutional Rights**

19 Marks alleges Walmart violated his rights under the 8th and 14th Amendments.
20 Individuals alleging violations of their constitutional rights usually assert a claim under 42
21 U.S.C. § 1983. The court assumes Marks is attempting to do so. However, a § 1983 claim
22 “requires the wrongdoer to be a state actor.” *Pasadena Republican Club v. W. Just. Ctr.*,
23 985 F.3d 1161, 1171 (9th Cir. 2021).

24 There are four tests by which Walmart might qualify as a state actor: “(1) public
25 function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental
26 nexus.” *Id.* at 1167. Marks has not alleged sufficient facts to meet any of these tests. Thus,
27 Walmart does not qualify as a state actor and cannot be sued for violating Marks’s
28 constitutional rights. There are no plausible factual allegations Marks could make that

1 would result in Walmart qualifying as a state actor in these circumstances. The § 1983
2 claim is therefore dismissed without leave to amend.

3 **b. Employment Discrimination Statutes**

4 Based on the events alleged in the complaint, Marks may be attempting to allege an
5 employment discrimination claim under Title VII or the ADEA. Unfortunately, the
6 complaint does not set forth a sufficiently clear factual background to understand the nature
7 of Marks's claim. Walmart interprets Marks as asserting a "failure to hire" claim, but
8 Marks seems to believe he was hired and then subjected to disparate treatment based on
9 his race or age. It is not necessary to decide which type of claim Marks is attempting to
10 pursue because the complaint does not contain sufficient factual allegations to state either
11 type.

12 Statutory discrimination claims are often analyzed using a multi-step framework
13 that requires a plaintiff first make a prima facie showing of certain facts before the burden
14 shifts to the defendant to make different showings. The requirement of establishing a prima
15 facie case is an "evidentiary standard" and not a "pleading requirement[]." *Swierkiewicz v.*
16 *Sorema N. A.*, 534 U.S. 506, 510 (2002); *see also Sheppard v. David Evans & Assoc.*, 694
17 F.3d 1045, 1050 n.2 (9th Cir. 2012) ("A plaintiff in an ADEA case is *not required* to plead
18 a prima facie case of discrimination in order to survive a motion to dismiss."). Thus, a
19 complaint cannot be dismissed merely because it does not contain facts establishing all the
20 requirements of a prima facie case. *See Austin v. Univ. of Oregon*, 925 F.3d 1133, 1137
21 (9th Cir. 2019). But it is helpful to consider the elements of a prima facie case when
22 assessing the plausibility of a complaint. *See Khalik v. United Air Lines*, 671 F.3d 1188,
23 1192 (10th Cir. 2012) (holding a plaintiff is not required to "establish a prima facie case in
24 her complaint" but "the elements of each alleged cause of action help to determine whether
25 Plaintiff has set forth a plausible claim"). Here, the complaint lacks crucial elements of a
26 prima facie case and does not contain any other allegations making Marks's discrimination
27 claim plausible.

28 If Marks is attempting to pursue a failure to hire claim, his prima facie case would

1 require he establish “(1) [he] is a member of a protected class; (2) [he] applied for a job for
2 which [he] was qualified; (3) [he] was rejected; and (4) the position remained open and the
3 employer sought other similarly-qualified employees.” *Surrell v. California Water Serv.*
4 *Co.*, 518 F.3d 1097, 1105–06 (9th Cir. 2008). The complaint establishes Marks is part of a
5 protected class, but it does not contain sufficient allegations that Marks had the
6 qualifications necessary for the alleged opening nor that the position remained open after
7 Marks applied. Without these allegations or any other indication of prohibited intent,
8 Marks has not stated a plausible failure to hire claim.

9 If Marks is attempting to pursue a disparate treatment claim, his prima facie case
10 would require he establish “(1) [he] belongs to a protected class, (2) [he] was performing
11 according to her employer’s legitimate expectations, (3) [he] suffered an adverse
12 employment action, and (4) other employees with qualifications similar to her own were
13 treated more favorably.” *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 640 n.5 (9th Cir.
14 2003), as amended (Jan. 2, 2004); *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207
15 (9th Cir. 2008). The complaint does not allege Marks was performing adequately and other
16 similarly-situated employees were treated differently. Again, without factual allegations
17 establishing these facts or allegations hinting that Walmart’s actions were based on a
18 prohibited intent, Marks has not stated a plausible disparate treatment claim.

19 As discussed in the next section, Marks is granted leave to amend his statutory
20 claims, but he must consider whether doing so is appropriate in light of his apparent failure
21 to exhaust his administrative remedies with the EEOC.

22 **III. Leave to Amend**

23 Marks filed a motion to amend his complaint indicating he wishes to amend his
24 complaint to include claims against Josh Sanchez, an employee of the EEOC. (Doc. 10.)
25 Marks’s motion was not accompanied by a proposed amended complaint and the
26 arguments in the motion do not point towards any plausible claim Marks could assert
27 against Sanchez. Marks’s motion seems to indicate he wishes to sue Sanchez for lying, but
28 it is unlikely Marks can state a viable claim against Sanchez merely for lying. Because the

1 court cannot determine what claims Marks wishes to assert against Sanchez, the current
2 motion to amend the complaint is denied.

3 While Marks's motion to amend is denied, he will be given one opportunity to
4 amend his complaint. In that amended complaint Marks may attempt to assert a claim
5 against Sanchez, although he must allege sufficient facts showing Sanchez might be liable.
6 In addition, while the court was able to identify possible claims Marks might be able to
7 pursue against Walmart, Marks cannot proceed on those claims if he did not file a claim
8 with the EEOC. *See* 42 U.S.C. § 2000e-5 (Title VII's exhaustion requirement); 29 U.S.C.
9 § 626(d)(1) (ADEA's exhaustion requirement). In other words, if Marks did not file a claim
10 with the EEOC, it would be futile to file an amended complaint alleging discrimination
11 claims.

12 **IV. Appointment of Counsel**

13 Marks requests the court appoint counsel based on his age, finances, and several
14 illnesses. (Doc. 15.) Determining whether to appoint counsel in a Title VII suit requires the
15 court consider "(1) the plaintiff's financial resources; (2) the efforts made by the plaintiff
16 to secure counsel on his or her own; and (3) the merit of the plaintiff's claim." *Johnson v.*
17 *U.S. Dep't of Treasury*, 939 F.2d 820, 824 (9th Cir. 1991). The court will assume Marks
18 lacks the financial resources to obtain counsel, so resolution of the request depends on the
19 second and third factors. Marks has not provided any explanation of efforts to obtain
20 counsel nor stated any claim on which relief might be granted. The failure to make his own
21 efforts to obtain counsel and to plead plausible claims warrants denial of Marks's motion
22 for the appointment of counsel. Marks may renew his motion after he amends his complaint
23 to state a claim on which relief might be granted.

24 Accordingly,

25 **IT IS ORDERED** the Motion to Dismiss (Doc. 7) is **GRANTED** with leave to
26 amend. No later than **September 26, 2024**, plaintiff Chester Lee Marks shall file an
27 amended complaint. The Clerk of Court shall enter a judgment of dismissal without
28 prejudice in the event no amended complaint is filed by that date. An amended complaint,

1 if any, may not allege claims for violations of constitutional rights but may allege statutory
2 discrimination claims against Walmart. The amended complaint may also name Josh
3 Sanchez as a defendant if Marks identifies some way by which Sanchez could be liable.

4 **IT IS FURTHER ORDERED** the Motion to Amend (Doc. 10) and Motion to
5 Appoint Counsel (Doc. 15) are **DENIED**.

6 Dated this 11th day of September, 2024.

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10 **Honorable Krissa M. Lanham**
11 **United States District Judge**
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